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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL; HARRY K. RUSH; RAYMOND G. LINDBLAD; CHARLES A. BRITTON; GARY W. BLEACHER; DAVID L. DONDERO; STEWART PALILONIS; ROBERT FULPER, JR.; WERNER J. HOFF; EUGENE J. VENETTONE; BARBARA GILL; JOSEPH HELEWA,

Petitioners,

v.

ALFRED DEBLASIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. IN DETERMINING WHETHER OR NOT AN APPLICANT HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST, COURTS OF APPEALS OTHER THAN THE THIRD CIRCUIT HAVE CONSISTENTLY LOOKED TO STATE LAW—NOT TO THE EVIDENTIARY RECORD OR THE ACTIONS OF INDIVIDUAL ZONING BOARD MEMBERS—IN ORDER TO DETERMINE WHETHER A LOCAL ZONING AGENCY HAS DISCRETION TO DENY THE VARIANCE OR OTHER BENEFIT SOUGHT	3
II. EVEN ASSUMING THAT THIS COURT CHOSE TO APPLY THE LEGAL STANDARDS CREATED BY RESPONDENT, THE RECORD EVIDENCE STILL SUPPORTS THE CONCLUSION THAT THE ZBA DEFENDANTS HAD THE DISCRETION TO DENY THE VARIANCE	6
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Barbarisi v. City of Paterson Bd. of Adjustment, 103 A.2d 164 (N.J. Super. Ct. App. Div. 1954) .. 7
Biser v. Town of Bel Air, 991 F.2d 100 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 182 (1993) 4
Branagan v. Schettino, 242 A.2d 853 (N.J. Super. Ct. App. Div. 1968) 7
Bressman v. Gash, 621 A.2d 476 (N.J. 1993) 5
Eagle Group v. Zoning Bd. of Adjustment, 664 A.2d 1115 (N.J. Super. Ct. App. Div. 1994) 5, 7
Hartman v. Township of Randolph, 155 A.2d 554 (N.J. Super. Ct. App. Div. 1959) 7
Hawrylo v. Harding Tp. Board of Adjustment, 592 A.2d 1236 (N.J. Super. Ct. App. Div. 1991) 9
Katz v. Morgenthau, 709 F.Supp. 1219 *aff'd in part, rev'd in part*, 892 F.2d 20 (2d Cir. 1989) 8
Medical Realty Associates v. City of Summit Bd. of Adjustment, 549 A.2d 469 (N.J. Super. Ct. App. Div. 1988) 8
Neuwirth v. Louisiana State Bd. of Dentistry, 845 F.2d 553 (5th Cir. 1988) 6
Powell v. Workmen's Compensation Bd. of the State of New York, 327 F.2d 131 (2d Cir. 1964) .. 8
RRI Realty Corp. v. Inc. Village of Southampton, 870 F.2d 911 (2d Cir. 1989) 4
Silver v. Franklin Tp. Bd. of Zoning Appeals, 966 F.2d 1031 (6th Cir. 1992) 5
Spence v. Zimmerman, 873 F.2d 256 (11th Cir. 1989) 5
Wilkerson v. Johnson, 699 F.2d 325 (6th Cir. 1983) 6
Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54 (2d Cir. 1985) 3
Zahra v. Town of Southold, 48 F.3d 674 (2d Cir. 1995) 4

Statutes:

New Jersey Municipal Land Use Law, N.J. Stat. Ann. § 40:55D-70 8

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Respondent DeBlasio's Brief in Opposition to Petition for Writ of Certiorari ("Brief in Opposition") fails to address any of the following reasons offered by Petitioners and the *Amici Curiae* favoring the grant of review by this Court:

- the mature and multi-faceted split among the Courts of Appeals, generally, and this singular and dangerous decision by the Court of Appeals for the Third Circuit, specifically (*See e.g.*, Petition for a Writ of Certiorari ("Petition") at 9-14);

- the equally remarkable split between the Third Circuit and the state courts of New Jersey (*See e.g.*, Brief of the New Jersey State League of Municipalities as *Amicus Curiae* in Support of Petitioners (the "League's Brief") at 13-19);
- the striking inconsistency between the Third Circuit's wildly expansive approach and the evolving restraint of this Court's substantive due process jurisprudence (*See e.g.*, Petition at 15-17; League's Brief at 5-13; Brief of the States of New Jersey, et al. As *Amici Curiae* in Support of Petitioners (the "Attorney Generals' Brief") at 9-13);
- the lack of authoritative guidance provided by this Court (*See e.g.*, Majority below at 11a, 17a, n.9); and,
- the threat to federalism and volunteerism posed by both the uncertainty in the current law and the reality of operating under the Third Circuit's new test (*See e.g.*, Petition at 18-22; League's Motion at 2-4; League's Brief at 2-4, 13-19; Attorney Generals' Brief at 1-3).

Instead, DeBlasio responds with 12 pages of factual meanderings and a single argument premised on an incorrect reading of one case from another Circuit. At this procedural stage, little—if any—of what Respondent argues is relevant to the Court's determination of whether or not to grant review. Moreover, even the most cursory analysis of the Brief in Opposition reveals that the Respondent utterly misapprehends the controlling law and grossly misstates the pertinent facts.

ARGUMENT

Respondent asks this Court to conclude that "no controversy" is presented by this case. This is the only basis for Repondent's opposition to the Petition, and may be summarized as follows: Because Respondent would prevail under either the Third Circuit's "mere ownership"

standard or the more common "legitimate entitlement" test—where "but for" the alleged bias of one or more of the ZBA defendants he would have had a "strong likelihood" of having his variance application granted because it was "an undisputed proven fact below" that his proposed use of the land was "less intense" than that conducted by prior owners, thereby "entitling" him as a matter of law to have his variance granted and thereby divesting the ZBA defendants of all "discretion" to reach any other conclusion—there is nothing here for this Court to decide. *See* Brief in Opposition at 15-20.

This "house of cards" argument is constructed on two demonstrably incorrect propositions: 1) it is the evidentiary record created before the local board on the discrete application in issue to which federal courts must look to determine whether the applicant has a legitimate claim of entitlement; and, 2) the evidentiary record created before the ZBA admits of only one reasonable determination, *i.e.* the grant of the variance. As will be shown below, both of Respondent's premises are false.

I. IN DETERMINING WHETHER OR NOT AN APPLICANT HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST, COURTS OF APPEALS OTHER THAN THE THIRD CIRCUIT HAVE CONSISTENTLY LOOKED TO STATE LAW—NOT TO THE EVIDENTIARY RECORD OR THE ACTIONS OF INDIVIDUAL ZONING BOARD MEMBERS—IN ORDER TO DETERMINE WHETHER A LOCAL ZONING AGENCY HAS DISCRETION TO DENY THE VARIANCE OR OTHER BENEFIT SOUGHT.

Respondent's legal argument—that he had an entitlement to a variance because the ZBA defendants had no discretion to deny his application as a result of the record facts demonstrating a "strong likelihood" that he would have received a variance "but for" their actions—is based entirely on a misreading of the Second Circuit's decision in *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985). Respondent takes a snippet of language out

of context from *Yale Auto Parts* and fails to note that as recently as February of this year the Second Circuit has expressly rejected his exact argument:

> The 'strong likelihood' aspect of *Yale Auto Parts* comes into play only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured; an entitlement does not arise simply because it is likely that broad discretion will be favorably exercised. *Since the entitlement analysis focuses on the degree of official discretion and not on the probability of its favorable exercise, the question of whether an applicant has a property interest will normally be a matter of law for the court.*

RRI Realty Corp. v. Inc. Village of Southampton, 870 F.2d 911, 918 (2d Cir. 1989) (emphasis added); *Accord Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995).

Thus, the Second Circuit looks solely to state law to determine the discretion of a local zoning board and will make such determinations (e.g. "strong likelihood") only when state law provides no discretion to the ZBA.

Courts of Appeals in other Circuits applying the "legitimate claim of entitlement" standard have also refused to base their findings of discretion, or lack thereof, on a factual review of the evidentiary record or on the actions of individual board members in a given case. Instead, these courts have also looked solely to state and municipal law in determining the amount of discretion afforded a local regulatory body. *Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 182 (1993) ("In applying this standard of entitlement, we have held that if a local agency has 'any significant discretion' in determining whether a permit should issue, then a claimant has no legitimate claim of entitlement and, hence, no cognizable property interest. The fact that Biser believes that the Board acted arbitrarily does noth-

ing to change the fact that he was not deprived of any entitlement or right."); *Silver v. Franklin Tp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992) ("We conclude that the Zoning Resolution as a whole gives the Board discretion to issue a conditional zoning certificate even if the property owner can demonstrate that the use is conditionally permitted under the Zoning Resolution. Because the Board has such broad discretion, Silver possessed neither a legitimate claim of entitlement to the zoning certificate nor a justifiable expectation that the Board would issue the certificate."); *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989) (holding that constitutionally protected property interest is found only if "the municipality lacks discretion and must issue a building permit to an applicant who complies with the statutory requirements *and* the applicant has fulfilled the requirements.") (emphasis in original).

Under New Jersey law, the discretion given the ZBA is clear. New Jersey zoning law authorizes a zoning board of adjustment to grant a variance in "particular" cases and for "special reasons". N.J. Stat. Ann. § 40:55D-70(d). Moreover, the New Jersey courts have recognized that the legislature has vested discretionary authority in boards of adjustment to grant or deny variance applications. *Bressman v. Gash*, 621 A.2d 476 (N.J. 1993). *See also Eagle Group v. Zoning Bd. of Adjustment*, 644 A.2d 1115, 1120 (N.J. Super. Ct. App. Div. 1994).

Therefore, under the legitimate claim of entitlement standard, properly understood, Respondent had no property interest in the variance which could support a substantive due process claim. Put simply, New Jersey state law permitted the ZBA defendants to make the decision they made, and the federal courts are not in the business of re-analyzing the record evidence supporting that decision. The type of record sifting that Respondent is asking the United States Supreme Court to now perform is the proper domain of the New Jersey state courts. *See e.g.*,

League's Brief at 14-17; Attorney Generals' Brief at 12-13.[1]

II. EVEN ASSUMING THAT THIS COURT CHOSE TO APPLY THE LEGAL STANDARDS CREATED BY RESPONDENT, THE RECORD EVIDENCE STILL SUPPORTS THE CONCLUSION THAT THE ZBA DEFENDANTS HAD THE DISCRETION TO DENY THE VARIANCE.

Notwithstanding the above, Petitioners feel compelled to address briefly Respondent's factual argument because it contains numerous incorrect assertions regarding settled New Jersey zoning law and the record created before the Zoning Board.

First, Respondent would have had no right under New Jersey law to have placed *any* nonconforming use on his property merely because it was no more "intense" than

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[1] Apparently as a fall-back position, Deblasio argues that the legitimate claim of entitlement standard is fundamentally unfair because it "shackles a landowner with the added burden" of "proving entitlement to a variance, permit or license" when "persons who are denied occupational licenses need only show that their license application was arbitrarily denied to state a claim." Brief in Opposition at 24; *See also* **Majority, 18a, n.11.**

However, Respondent's analogy also fails. Courts have applied the same standard to both applicants seeking occupational licenses and applicants seeking variances in land. For instance, in *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553 (5th Cir. 1988), an out-of-state dentist sued the Louisiana State Board of Dentistry for "arbitrarily" denying his application for a reciprocal license. *Id.* at 555. In holding that the dentist had no constitutionally protected interest in a reciprocal license without an examination, the court found dispositive a Louisiana statute which provided that the Board "may issue a license without exam" on reciprocal terms. *Id.* at 557.

Further, the only case cited by Respondent and the Majority in support of this analogy to the occupational licensing context held that the state's denial of a barbershop license unconstitutionally deprived the applicant of his "liberty" interest in pursuing his occupation, but expressly did not reach the "property" interest issue. *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983).

his once valid, preexisting nonconforming use of a one-man auto repair business. Rather, as correctly recognized by the Dissent, under settled New Jersey law:

> an existing nonconforming use may not be enlarged or changed as of right and will be allowed to persist only 'if it is a continuance of substantially the same kind of use as that to which the premises were devoted at the time of the passage of the zoning ordinance.' *Id.* Furthermore, '[w]here there is doubt as to the substantiality of the extension, it should be disapproved.' *Hartman v. Township of Randolph*, 155 A.2d 554, 558 (N.J. Super. Ct. App. Div. 1959).

(28a).

Here, Respondent illegally and deliberately changed the use (as well as the intensity of the use) without a use variance. *See Barbarisi v. City of Paterson Bd. of Adjustment*, 103 A.2d 164 (N.J. Super. Ct. App. Div. 1954). Indeed, Respondent illegally changed the use shortly after a use variance to allow a drywall storage business on his property had been denied and shortly after the then Township Building Inspector had advised Respondent of the limited nature of his nonconforming use. As a matter of law, Respondent abandoned his valid nonconforming use and was required either to conform the use on his property to the current zoning or obtain a use variance.[2] *Id.* at 167-168.

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[2] Respondent seems to suggest (Brief in Opposition at 6) that because he had been successful in maintaining his illegal use for a number of years, estoppel should have been applied. However, under settled New Jersy law, a zoning board lacks jurisdiction to decide equitable issues and can only act within its statutory framework. *Branagan v. Schettino*, 242 A.2d 853, 858 (N.J. Super. Ct. App. Div. 1968). Only the New Jersey courts can decide such equitable issues. *Id.* Of course, Respondent chose not to pursue his state court remedies. Moreover, there was no "campaign" to oust Interstate Battery. Rather, Interstate's illegal operation in a residential zone had grown from a very small one to a large one (4a). Understandably, the Lavans were upset with this growing

Moreover, because Respondent had as a matter of law abandoned the nonconforming use, the issue before the Zoning Board was not, as Respondent believed, whether the battery storage and distribution business as operated by Interstate was more or less intense than a one-man auto repair business. Rather, the issue was whether Interstate's operation met the subjective criteria established under the New Jersey Municipal Land Use Law for *establishing* a commercial use in a residential zone. *N.J. Stat. Ann.* § 40:55D-70. *See e.g., Medical Realty Associates v. City of Summit Bd. of Adjustment*, 549 A.2d 469, 473-474 (N.J. Super. Ct. App. Div. 1988); *Dissent* (29a).

Among other things, the evidentiary record created before the Zoning Board clearly demonstrates that the amount of traffic, type of traffic and hours of operation of Interstate were far beyond the character contemplated in the residential zone and that, therefore, Respondent had failed to prove that "the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." *N.J. Stat. Ann.* § 40:55D-70. Thus, even under Respondent's incorrect application of the "legitimate claim of entitlement" test, the record before the Zoning Board did not admit of only one reasonable conclusion. Accordingly, even under Re-

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intrusion next door and demanded that West Amwell enforce its zoning ordinances. The Lavans had as much right to request municipal agencies to take action to prevent an illegal use of an adjoining property as did the Respondent to request a variance to allow an otherwise illegal use on that property. *See e.g., Katz v. Morgenthau*, 709 F.Supp. 1219, 1231 *aff'd in part, rev'd in part*, 892 F.2d 20 (2d Cir. 1989) (*citing, Powell v. Workmen's Compensation Bd. of the State of New York*, 327 F.2d 131, 137 (2d Cir. 1964) (no merit to plaintiff's conspiracy allegations where the facts indicated no more than the actions of several interested parties who vigorously sought to protect their own interests.)

spondent's misplaced argument, the Zoning Board had "discretion" to deny the variance.[3]

In sum, this case presents a live controversy warranting this Court's attention. As demonstrated above and in the Petition, whether or not Respondent's substantive due process is viable (and, thus, whether or not Respondent and others like him will receive a federal court jury trial on such claims) will be determined, at least as a threshold matter, by which test the reviewing court chooses to apply. Under current law, the viability of a substantive due process claim such as DeBlasio's may be judged by any one of at least three disparate tests (*i.e.*, "mere ownership," "legitimate claim of entitlement" and "fundamental rights") depending upon the happenstance of geographic location. Lack of uniformity of this magnitude is highly corrosive to the cornerstone of our theoretically unified system of federal courts: The consistent adjudication of disputes among similarly situated citizens, regardless of forum. It is difficult to imagine that another petition could present these issues any more starkly and simply to this Court.

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[3] In New Jersey, a zoning board, like any court or jury, may accept or reject expert testimony. *Hawrylo v. Harding Tp. Board of Adjustment*, 592 A.2d 1236, 1241 (N.J. Super. Ct. App. Div. 1991). Here, the Zoning Board acted quite properly in rejecting patently incredible testimony from Respondent's expert to the effect that Interstate's use, which included six full-time and two to three part-time employees, utilizing four tractor trailer trucks which idled outside of the building and operated from Monday through Saturday beginning at 6:30 a.m., was less intense than a one-man, indoor, automobile repair shop which operated from 8:00 a.m. to 6:00 p.m., Monday through Friday.

CONCLUSION

Respondent has presented nothing in his Opposition which refutes or diminishes the substantial and compelling reasons for the granting of the Petition asserted by Petitioners and strongly endorsed by *Amici Curiae* Attorneys General and prospective *Amicus Curiae* New Jersey League of Municipalities. Therefore, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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